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IN THE

Supreme Court of the United States

TERM, 1963

No. ~~939~~ 940

L. LLOYD CROSBY,

Petitioner,

v.

THE BRADSTREET COMPANY, and
S. STEWART CROSBY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAY LEO ROTHSCHILD,
Counsel for Petitioner.

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IN THE

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No. .....

L. LLOYD CROSBY,

Petitioner,

v.

THE BRADSTREET COMPANY, and S. STEWART CROSBY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on January 17, 1963.

The Opinions Below

The opinion of District Judge Sugarman (unreported) is printed in Appendix A (*infra*, p. 16). The opinion of the Court of Appeals (as yet unreported [Lumbard, Chief Judge; Moore and Hays, Circuit Judges]), as deleted by it on February 7, 1963,† and the "jurisdiction" order referred to in said opinion [irrelevant on this Petition] annexed thereto as Exhibit 1—is printed in Appendix B (*infra*, p. 18).

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* Nine copies of each of the three Court of Appeals Appendices are submitted herewith. Accordingly, page references, unless otherwise specified, are to: Plaintiff's Court of Appeals Appendix [a]; to Appellee L. Lloyd Crosby's Court of Appeals Appendix [b]; to the Certified Record: [R. p.]. All italics are ours.

† Shown by stricken lines in the Opinion in the Certified Record (R. p. 58a), and in brackets on page 22 *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on January 17, 1963, vacating a decree rendered in 1933 in what appears to have been an action in the nature of libel, originally commenced in the New York Supreme Court, and, by reason of diversity of citizenship, removed to the Southern District of New York (9a). In said action, the plaintiff was S. Stewart Crosby, one of the Respondents herein; and the defendant was The Bradstreet Company, the other Respondent herein (R. p. 5a). The action was settled by a consent decree made in 1933 (R. p. 5a). The judgment of the Court of Appeals, now sought to be reviewed, resulted from an application made by plaintiff, twenty-nine years later, in 1962—pursuant to Rule 60 (b) (5) (6)—to vacate said decree (R. pp. 8a-12a). The district Court denied the application (R. p. 4a). The Court of Appeals thereafter reversed that decision, and granted the application (R. p. 59a). On Appellee, L. Lloyd Crosby's, Petition for Rehearing (R. p. 61a), the Court of Appeals amended its opinion (R. p. 58a)—we assume, in response to our representations—but, on February 11, 1963 (R. p. 73a), denied the Petition for Rehearing. Application for a stay, pending this Court's disposition of this Petition for Certiorari, was denied on March 5, 1963 (R. p. 83a).

Jurisdiction of this Court is invoked under 28 U.S.C., § 1254 (1).

Questions Presented

1.

Should said decree made in 1933, in a libel action brought by plaintiff, S. Stewart Crosby, for his benefit and that of Petitioner, L. Lloyd Crosby, against defendant Bradstreet, but actually prosecuted and financed by plaintiff's brother (Petitioner herein), be said to have been rendered without jurisdiction, and declared void as in violation of the First Amendment to the Constitution of the United States because it restrains defendant (a credit bureau) from disseminating any information with respect to mem-

bers of plaintiff's and Petitioner's family or their business activities (including their misfortunes in criminal proceedings which had been the subject of said libel action); or, on the contrary, when the parties under guidance of L. Lloyd Crosby consented to said decree, did they not waive what might have been their personal rights, under said First Amendment, against "prior restraint", so that said 1933 decree was and is valid?

2.

After a lapse of twenty-nine years, during which the said decree was observed, and plaintiff and Petitioner prospered under its protection, and after a sale, in 1962, to Petitioner, of plaintiff's interests in their common enterprises thus nurtured, and subsequent unfair competition waged by plaintiff against Petitioner, in which campaign the application under consideration was a tactic, should the Court of Appeals, disregarding all intervening equities, and on application of the plaintiff, supported by Bradstreet, and over the opposition of Petitioner, have reappraised the situation, *de novo*, and disregarded the waiver of the First Amendment, accomplished by the parties' consent to the 1933 decree, and thus implemented plaintiff's malevolent purpose to harm Petitioner?

The Constitutional Provision Involved

The said First Amendment involved is printed in Appendix C (*infra*, p. 25).

Statement

We shall refer to the Petitioner herein as Lloyd; to his brother, one of the Respondents herein, as Stanford; to the other Respondent, The Bradstreet Company, as Bradstreet.

Lloyd and other members of his family, including Stanford—then known under their original family name of Grossberg (2b)—were all active in the same business, and, therefore, each was necessarily affected by whatever might

be the esteem in which any one of them was held by the public (10a).

Almost 30 years ago, judgment was entered in the Southern District Court, enjoining Bradstreet from issuing any report or comment as to Stanford, Lloyd, and other members of the family (then all, except for their father, Henry, known under the family name of Crosby [11a]), or as to any of their several corporations (5a-6a). It was stipulated in said judgment that said injunction should operate in favor of all of them, for the "present, past or future". Said judgment was entered on consent.

The injunction concluded an action, in the nature of defamation (in which injunctive relief was asked [20a]), brought against Bradstreet in the New York Supreme Court— and from there removed by Bradsfreet to the District Court (9a)—for publishing libellous misstatements, as to the involvements of Stanford and Lloyd in criminal proceedings which had been tried in the District Court a year earlier, and which had resulted in the acquittal of Stanford, but only in a jury disagreement as to Lloyd, who thereupon, because he could not afford the expense of a new trial, pleaded guilty and received a suspended sentence (20a-21a, 30a).

Said petition for removal and said complaint cannot be found (20a). Accordingly, all that is known as to the nature of the original action, appears from Bradstreet's answer and the affidavits herein. Therefrom, it appears that Bradstreet had *asserted* that it had published a "true" report, except that it said that "The finding of the jury was to the effect that Stanley Grosberg [Stanford] was guilty of fraud" (Answer, par. 13th, 2b).

Lloyd paid all expenses incurred in defending the criminal prosecution, and also those incident to prosecuting the defamation action, which was initiated and concluded under his direction (21a). Stanford himself alleged, in his petition:

> "4. According to petitioner's present recollection, the action was brought at the instance of petitioner's brother L. Lloyd Crosby and the above disposition thereof was

arranged by Mr. Davis also at the instance of petitioner's said brother." (10a)

Thereafter, in 1938, Lloyd organized the Commonwealth Corporations, which engaged in the business of vermin extermination (22a). Under the protection of the aforesaid injunction, the several members of the family worked together and prospered. As Stanford himself alleged in his petition:

"5. For many years thereafter, the petitioner and his said brother were associated together in business and what served petitioner's brother's interest served also the interests of the petitioner." (10a)

Disagreements having arisen between them, on March 31, 1960 Lloyd purchased Stanford's stock interest, for $415,000. In effectuating the aforesaid sale of stock, "No stipulation was made as to the injunction order, because both parties * * * knew and proceeded on the basis that the injunction order would remain in force. There was no suggestion, on either side, that any attempt would be made to vacate that order" (33a).

Lloyd paid $124,000 down, and paid $76,000 more on January 17, 1961. He owed the balance, which he was required to pay in instalments of $2,150 a month—an obligation thus extending over years to come (22a-23a). Lloyd's sources of income from which to make these projected payments were the very corporations in which Stanford had owned the stock he sold to Lloyd.

It is undisputed that approximately three months after the sale aforesaid, and Lloyd's initial payment of $124,000, Stanford went into business under the name "Crosby Exterminating Company", in competition with Lloyd's companies; that Stanford operated from premises on Bigelow Boulevard, Pittsburgh, Pennsylvania—on the same side of the street, just one block away from the premises of Lloyd's companies; that he utilized confidential knowledge which he had acquired when he was with Lloyd; that he raided Lloyd's accounts; copied Lloyd's companies' form of advertisement in telephone directories, and engaged in unfair competition generally (23a).

Thus:

On January 17, 1962, Lloyd paid Stanford $76,000.

In anticipation thereof, and awaiting said payment, Stanford—one week earlier, on January 10, 1962—prepared the petition on his underlying application to the District Court.

On January 19, 1962—two days after Stanford had received said sum of $76,000—the order to show cause on said petition was signed (23a).

In his petition, Stanford asked that the injunction be vacated, ostensibly so that he might have credit reports issued about him and his business. This, notwithstanding that for almost thirty years the brothers had prospered without credit ratings, and that it is a commonplace that many firms do not seek credit, and are not reported in Bradstreet's (34a). Stanford did not deny that credit is quite a negligible feature in the exterminating business; that, with as small an inventory as $3,000, representing supplies, service fees of $600,000 were earned; and that bank credit was and is available (34a). To show that he needed credit, Stanford merely exhibited letters, "taken from my [his] files at random" (27a). "At random" was hardly the appropriate characterization. The letters showed that they were all written to him within a period of three weeks, and involved purchases of $25; $300; $7.20; $56.30 (4b-5b).

The fact is that Stanford's objective was to expose Lloyd to obloquy, in order to wreck Lloyd's business and, thus, to eliminate him as a competitor. For it was only from Lloyd's business that Lloyd could make payments to Stanford.

The Disposition in the Courts Below

In the District Court neither plaintiff nor Bradstreet raised any issue as to the First Amendment. The issue was only as to the equities.

The District Court denied Stanford's application to vacate the 1933 decree, because "the equities require denial of this application", and because the court was "convinced that the harm which will befall L. Lloyd Crosby if the

relief sought is granted by far outweighs the benefits that may accrue therefrom to the plaintiff Stanford Crosby" (R. p. 5a).

It was in the Court of Appeals, that, for the first time, both plaintiff and Bradstreet invoked the constitutional provision, which they had both waived. Only then did they become defenders of the First Amendment.

Disregarding the waiver, the Court of Appeals held that the 1933 decree "was in violation of the First Amendment to the Constitution", which, it held, "limits court action". It did not concern itself with the fact that the stipulation of settlement had the effect of waiving strictly personal rights, which the parties might otherwise have asserted. Nothing in the Court's opinion indicates that it gave heed to this basic proposition.

The Court of Appeals did not reach the question as to whether Lloyd had "standing to oppose" the application (R., p. 58a). He undoubtedly did (see *infra*, p. 13).

Reasons for Granting the Writ

Relying on *Near* v. *Minnesota ex rel. Olson* (283 U. S. 697) and *Shelly* v. *Kraemer* (334 U. S. 1), the Court of Appeals held that the District Court 1933 judgment was void, because it constituted a "prior restraint" of freedom of speech, and of the press. But neither of said cases is applicable. For, even if the First Amendment would otherwise have been applicable, it was waived by the parties. Such is the effect when, as here, a "prior restraint" is the result of a stipulation made in the course of litigation. So it was explicitly held in *In Re George F. Nord Bldg. Corp.* (129 F. 2nd 173 [CA 7]; cert. den. 317 U. S. 670).

Moreover, though the Fourteenth Amendment restrains state courts, the First Amendment restrains only Congress, not federal courts. The right to decide must reside in some superior authority (See *Chicot* case, *infra*, p. 10).

The 1933 decree, being valid, it was error for the Court of Appeals in 1963, to reappraise the situation as if it were still 1933, and to relieve plaintiff and the Bradstreet

Company of their stipulation and the judgment predicated thereon—all in disregard of intervening equities.

Accordingly, the decision in the case at bar is directly in conflict with that in the *Nord* case (*supra*) and with other authorities, including *United States* v. *Swift & Co.* (286 U. S. 106) of which we shall now make exposition.

Protections guaranteed by the First Amendment are quite the same with respect to freedom of the press as they are with respect to freedom of speech. Both are "cognate rights * * * and therefore are united in the First Article's assurance" (*Thomas* v. *Collins*, 323 U. S. 516, 530). Accordingly, the authorities treating of either phase are relevant to the other.

In Re George F. Nord Bldg. Corp. (129 F. 2nd 173 [CA 7]; cert. den. 317 U. S. 670) is in point. In that case, it was argued that an order made by the District Court, on consent, enjoining all persons from sending general written communications to creditors and shareholders of a corporation, could not thereafter be challenged as in violation of the First Amendment. The court said:

> "Furthermore, the right of free speech guaranteed by the Constitution of the United States, Amend. 1, and the Constitution of Illinois, Smith-Hurd Stats., art. 2, § 4, is not an absolute right. It is a relative right that may be modified in its interplay with the rights of others, and it may be waived by the party for whose benefit it was intended. *In re Schroeder Hotel Co., supra*, 86 F. 2nd 491, 494. *Certainly, one who has been a party to a proceeding wherein a consent decree has been entered and who has been a party to that consent, is in no position to claim that such decree restricts his freedom of speech. He has waived his right and given his consent to its limitations within the scope of that decree.*" (p. 176)

So it was also held in *In Re Schroeder Hotel Co.* (86 F. 2nd 491 [CA 7], in which the same question was raised with respect to an order from which an appeal had not been taken. An interesting discussion of the question will be found at P. 494.

It should be noted that, in the *Nord* case (*supra*), those who disobeyed the order were held in contempt; and that, in the *Schroeder* case, an injunction was sustained. That the underlying decree was valid, was thus confirmed.

As illustrated by the cases in which anti-strike agreements have been upheld and enforced (*Natl. Labor Relations Board* v. *Columbian, etc. Co.*, 96 F. 2nd 948, 953 [CA 7], affd. 306 U. S. 292), though, absent an agreement not to strike, the right to strike would be protected (*American F. of L.* v. *Swing*, 312 U. S. 321), such rights, under the First Amendment, are considered to be personal, private, and dispensable by voluntary waiver or equitable estoppel (*Schneider* v. *State*, 308 U. S. 147, 161; *Alabama Cartage Co.* v. *Internatl. Brotherhood, etc.*, 250 Ala. 372; 34 So. 2nd 576; *Nevins, Inc.* v. *Kasmach*, 279 N. Y. 323, 18 N. E. 2nd 294).

As said in *Michel* v. *Louisiana* (350 U. S. 91)—quoting from *Yakus* v. *United States* (321 U. S. 414, 444):

> "'No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right * * * *'" (p. 99).

The cases exemplifying this proposition are legion.

Prior Restraint Is Not Necessarily A Violation of the First Amendment.

The Court of Appeals proceeded on the assumption that a libel may not be enjoined (R., p. 57a). But the very case it cites (*American Malting Co.* v. *Keitel*, 209 Fed. 351 [CA 2]) [R. p. 57a] admits that, under appropriate circumstances, a libel may be restrained; and the New York authorities (applicable in a diversity case, such as this) are to that effect (*Wolf* v. *Gold*, 9 App. Div. 2nd 257).

Moreover, injunctions generally, though involving prior restraint, were sustained in *U. S.* v. *Lorain Journal Co.* (92 F. Supp. 794, 801 [D. C., Ohio]; affd. 342 U. S. 143); *U. S.* v. *Associated Press* (52 F. Supp. 362, 374 [S.D.N.Y], affd. 326 U. S. 1, reh. den. 326 U. S. 802)—a decision of the District Court, composed of three judges, i.e., Learned

Hand, Swan, and Augustus N. Hand, JJ.; *Halsted* v. *Securities & Exchange Commission* (182 F. 2nd 660, 668 [D. C. Circ.]; cert. den. 340 U. S. 834; *National Labor Relations Board* v. *Federbush Co.* (121 F. 2nd 954, 956).

It is, accordingly, settled that the "prior restraint" rule is not absolute, but marked by noteworthy exceptions: *Chaplinsky* v. *New Hampshire* (315 U. S. 568, 572); *Near* v. *Minnesota* (283 U. S. 697, 716); *Joseph Burstyn Inc.* v. *Wilson* (343 U. S. 495, 502-4); *Beauharnais* v. *Illinois* (343 U. S. 250, 266); *Ex Parte Jackson* (96 U. S. 727); *Hannegan* v. *Esquire Inc.* (327 U. S. 146).

Even An Illegal Prior Restraint Does Not Render the Decree Void, For There Was, Nevertheless, Jurisdiction to Make the Decree. Since There Was Such Jurisdiction, the 1933 Decree Was Not Void.

It follows from the foregoing that it may not be said, as it was by the Court of Appeals herein—from the mere circumstance that a prior restraint is decreed as to what an individual may say in the future—that, on its face, that restraint is void by reason of the First Amendment (*Poulos* v. *New Hampshire*, 345 U. S. 395, 405; *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43, 47-9) or that right or wrong, the court was without jurisdiction to order the restraint. As said by this Court in the *Times Film* case:

> "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test" (p. 49).

A fortiori, in a case such as this, where the complaint is not available for inspection, and where, therefore, the very basis upon which the court saw fit to approve the stipulation of the parties, does not appear.

Chicot County Drainage District v. *Baxter State Bank* (308 U. S. 371), is in point. In that case, it was held that certain bondholders of a Drainage District, who had been parties to a proceeding, but who did not question the constitutionality of the underlying Congressional statute, were, in a subsequent action, barred—both as to issues decided

by the prior proceeding, and as to those which might have been but were not there tendered. This Court ruled that, irrespective of whether the statute was constitutional or not, the District Court had acted with jurisdiction, for it was that court's duty to determine whether it had jurisdiction, and that "that determination would have been final save as it was open to direct review upon appeal" (p. 378).

To the same effect *Walling* v. *Miller* (138 F. 2d 629 [CA 8]; cert. den. 321 U. S. 784); *Geneva Furniture Mfg. Co.* v. *Karpen* (238 U. S. 254, 259); cf.: *Adams* v. *U. S. ex rel. McCann* (317 U. S. 269, 273); *Amey* v. *Colebrook Guaranty Savings Bank* (92 F. 2nd 62, 63 [CA 2], cert. den. 302 U. S. 750).

The distinction between jurisdiction and even a Constitutional defense, is succinctly made in *United States* v. *Nudelman* (104 F. 2nd 549, 552 [CA 7]; cert. den. 308 U. S. 589), in which the court said:

> "• • • invalidity could not destroy the jurisdiction of the District Court to entertain and adjudicate the condemnation proceedings." (p. 552)

It was accordingly held—citing *Pierce* v. *Somerset Railway* (171 U. S. 641, 648)—that the Constitutional objection might be and was waived.

See, also, *Pierce Oil Corp.* v. *Phoenix Refining Co.* (259 U. S. 125, 128-9).

The Merits of the Underlying Decree Were Not Open for Consideration by the Court of Appeals.

Nor, since the 1933 decree was rendered with jurisdiction, was it permissible, at this remote date—well beyond the "reasonable" limit set by F.R.C.P. Rule 60—for the Court of Appeals to review the merits of the decree earlier made, and thus to ignore the maxim that the doctrine of *res judicata* embodies the mandates of public policy and private peace.

Such is, indeed, the lesson of *United States* v. *Swift & Co.* (286 U. S. 106), i.e., that "the injunction, right or wrong, became the judgment of the Court. • • • We are

not framing a decree. * * * We are not at liberty to reverse under the guise of readjusting" (pp. 117, 119). By that standard, it was inadmissible for the Court of Appeals to adjudicate the present application on the basis of its hindsight view that the decree "should never have been entered in the first place" (Opinion, R. p. 58a).

Nor was the Court of Appeals correct, when it said that the injunction restrained dissemination of information "which the community has the right to know and which Dun & Bradstreet had and has the right to publish" (R. p. 58a).

For that statement assumes what is in issue.

Bradstreet does not serve the public, but only its own subscribers (*Taylor* v. *Church*, 8 N. Y. 452; *Sunderlin* v. *Bradstreet*, 46 N. Y. 188). It is, therefore, not absolutely responsible for the information which it circulates, for it may fall back upon the defense of "privilege" (*Xiques* v. *Bradstreet*, 70 Hun 334, affd. 141 N. Y. 605; *People ex rel. Daily Credit, etc.* v. *May*, 162 App. Div. 215, affd. 212 N. Y. 561; *Munro* v. *Bradstreet Co.*, 170 App. Div. 294). When it chooses not to give information, it may refrain from doing so. *Accordingly, by its consent to the 1933 decree, it agreed so to refrain—nothing at all inconsistent with its practices!* Yet, under the decision of the Court of Appeals, it may opportunistically disregard its contracts and repudiate all equitable principles of waiver and estoppel. For it, the Constitution is a utility, to be used or abused as it sees fit. This, we submit, should not be. It is of no concern to the people of the United States, or to their courts, that individuals agree to forego that upon which they might have insisted. It is of the essence of our democracy that individuals may agree not to do what they are not bound to do. As said by the New York Court of Appeals in the analogous case of *Matthews* v. *Associated Press, etc.* (136 N. Y. 333):

> "The constitutional provision regarding the liberty of speech and of the press has nothing whatever to do with such a provision, and no argument can make it plainer than does the reading of the constitutional provision itself." (p. 342)

Nothing in the Constitution guarantees that one who has waived its provisions, in order to strike a bargain, and buy immunity, may thereafter utilize the Constitution to evade performance of that bargain on his part. It is a commonplace that Constitutional rights may be lost, if not asserted in due time—even if it be only because an attorney omits to recite the magic ritual which the record must contain if the client is to be heard on Consitutional issues. By such waiver, the underlying judgment does not become void, but, on the contrary, may be, and is enforced —though as to another, who has been more alert and insistent on his rights, it may not be.

The principles thus fortified by the authorities, are in accord with elemental concepts of justice. The Constitution shields the citizens of the United States against uninvited transgression of their fundamental rights. It is not a fundamental right of any citizen to induce agreement, and reliance thereon; then to drain its benefits; and then to invoke the Constitution to repudiate what was thus solemnly agreed and thus to utilize it as an instrument to work inequity and exploitation.

The 1933 Decree Being Valid, the Court of Appeals Should Not Have Lent Its Aid to Stewart Crosby's Malevolent Purpose to Inflict Harm Upon Petitioner, Though In so Doing, He Utilized the Truth.

Equity will not tolerate "the doing of a harm malevolently, for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired" (*Aikens* v. *Wisconsin*, 195 U. S. 194, 203; *American Bank & Trust Co.* v. *Federal Reserve Bank*, 256 U. S. 350, 358). Yet, that is precisely what the Court of Appeals here did!

Lloyd Crosby Has Standing to Oppose the Motion.

There remains only to consider whether Lloyd Crosby has "standing to oppose this motion * * *" (footnote, p. 935 of Court of Appeals' Opinion, R. p. 58a; *infra*, p. 22). We submit that he has. A beneficiary of a judgment has

standing even to be the moving party (*U. S.* v. *International Boxing Club*, 178 F. Supp. 469, 471 [2nd Circ.]; *Gay* v. *Parpart*, 106 U. S. 679, 699). Lloyd Crosby actually prosecuted the underlying action, engaged counsel, and paid for his services—to protect the family interests, including his own (21a). His was certainly "the laboring oar" (*Drummond* v. *United States*, 324 U. S. 316, 318). So Stewart Crosby himself admits (Petition, par. 4, Appdx. 10a). Accordingly, Lloyd Crosby was bound by the decree which resulted (*Minneapolis-Honeywell Regulator Co.* v. *Thermoco Inc.*, 116 F. 2nd 845, 846 [CA 2]). By the same standard, because he is bound by the judgment, he has status to be heard with reference to it, and to preserve it (cf. *United States* v. *Swift & Co.*, 286 U. S. 106, 113, in which the moving parties were not those in the underlying action). The burden is upon the collaborating S. Stewart Crosby and Bradstreet, to show changed circumstances, making it "*no longer* equitable that the judgment should have prospective application" or "any other reason justifying relief from the operation of the judgment" [Rule 60 (b) (5) (6)], which was entered on their consent. "No longer" has no application to the case at bar. What was agreed in 1933, is even more important in 1963—lest the Court itself be utilized to do inequity. There is no reason to undo what has so well served all concerned. Every consideration—equitable and humane—points the other way. And it is clear that Rule 60 is governed by underlying equitable principles.

Conclusion

The Court of Appeals' decision is in conflict with the decisions of the Seventh Circuit Court of Appeals, and is also in conflict (1) with the general principle that allegedly constitutional rights may be waived, and (2) with applicable pronouncements to the same effect by this Court.

Indeed, the Constitution itself was, in the case at bar, utilized to do inequity.

The basic error responsible for the decision herein is indicated by the deletion which the Court of Appeals chose to make from its opinion, i.e., that the "district court was under a duty to nullify it [the 1933 decree] whenever the order came to its attention". The elimination of that misguided phraseology revealed, but did not exscind the mistaken rationale which spawned it, and which was responsible for the doctrinaire decision. For the 1933 judgment was not void, nor is there any constitutional mandate that individuals may not waive rights which they may otherwise assert. Nor was the Court of Appeals authorized to decide the matter *de novo*. Moreover, Bradstreet, for itself, had the right to waive and did—voluntarily and for consideration—waive what would otherwise have been its privilege of communicating credit information to its private subscribers. And, of course, plaintiff Stanford Crosby, could and did join in that waiver.

It is as important that the Constitution be not invoked to do inequity, as it is that it be enforced to protect essential freedoms. It is submitted that to permit abuse of the Constitution's protections, is to undermine those very guarantees, by diverting them from their dedicated purpose.

It is respectfully prayed that the petition for certiorari be granted.

Dated, March 15, 1963.

Respectfully submitted,

JAY LEO ROTHSCHILD,
Counsel for Petitioner.

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

S. STEWART CROSBY, Plaintiff, *against* THE BRADSTREET COMPANY, Defendant.	L. 52, P. 151

Re: S. Stewart Crosby v. The Bradstreet Company
L. 52, P. 151

April 10, 1962

The plaintiff moves to terminate, dissolve and annul the order of this court made on July 8, 1933, which *inter alia* restrained the defendant and its successors from issuing or publishing any report, comment or statement, either in writing or otherwise, concerning the plaintiff, his brother, L. Lloyd Crosby, who opposes the within application, and others, present, past or future. It seems a little late, in fact 28 years too late, for this plaintiff to suddenly become concerned about stripping his brother of the shield which protected his brother in the commercial world from disclosure of certain indiscretions in his brother's past history, when, as is here manifest, the plaintiff himself, as the sole party plaintiff in the instant suit, was the means of shielding his brother since the decree was entered at the plaintiff's behest.

This court's power to amend the order in question resides in F.R.Civ.P. 60(5) and (6). Subdivision (5) of the said rule allows for the relief sought if "it is no longer equitable that the judgment should have prospective application", and subdivision (6) thereof allows for the relief

for "any other reason justifying relief from the operation of the judgment." I read the word "judgment" in both subdivisions (5) and (6) in the context of the entire F.R.Civ.P. 60 to apply with equal force to the "order" herein involved.

This court will not lightly disturb an injunction in existence 28 years, particularly when the pleadings upon which the order of discontinuance and settlement was granted either in original or copy form, are no longer available. From what has been disclosed by the affidavits and memoranda submitted on the within application, I am of the opinion that the equities require denial of this application. I am convinced that the harm which will befall L. Lloyd Crosby if the relief sought is granted by far outweighs the benefits that may accrue therefrom to the plaintiff Stanford Crosby.

Accordingly, in the exercise of discretion, the application is as aforesaid denied.

It is so ordered; no further order is necessary.

s/ SIDNEY SUGARMAN,
U.S.D.J.

Microfilm
April 11, 1962

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 60—October Term, 1962

(Argued October 23, 1962 Decided January 17, 1963)

Docket No. 27606

S. STEWART CROSBY,

Plaintiff-Appellant,

v.

THE BRADSTREET COMPANY,

Defendant-Appellee.

and

L. LLOYD CROSBY,

Appellee.

Before:

LUMBARD, *Chief Judge,*
MOORE and HAYS, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Sidney Sugarman, *J.*, denying a motion under Rule 60(b) of the Federal Rules of Civil Procedure for relief from an order entered in the same court on July 8, 1933.

Reversed.

COPAL MINTZ, New York, N. Y., *for plaintiff-appellant.*

Appendix B

CHESTER BORDEAU, New York, N. Y. (White & Case, New York, N. Y., on the brief) *for defendant-appellee.*

JAY LEO ROTHSCHILD, New York, N. Y., *for appellee.*

LUMBARD, *Chief Judge*:

Stanford Crosby[1] appeals from the denial by the United States District Court for the Southern District of New York, of a motion under Rule 60(b) of the Federal Rules of Civil Procedure to relieve him from an order entered on stipulation on July 8, 1933. The district judge was of the opinion that the equities required denial of the application as he was convinced "that the harm which will befall L. Lloyd Crosby if the relief sought is granted by far outweighs the benefits that may accrue therefrom to the plaintiff Stanford Crosby." We reverse.

Stanford Crosby and his brother, L. Lloyd Crosby, were indicted by a federal grand jury in 1928 for mail fraud (now 18 U.S.C. § 1341). At trial in 1930, Stanford Crosby was acquitted, but the jury disagreed as to Lloyd Crosby. Lloyd Crosby then pleaded guilty and was given a suspended sentence.

In 1932 The Bradstreet Company, now Dun & Bradstreet, published a credit report which stated that Stanford and Lloyd Crosby had been found guilty of fraud. At that time the two brothers were in business together. In the same year, Stanford Crosby commenced a libel action in the New York Supreme Court against The Bradstreet Company based on the published credit report, which action was removed to the United States District Court. The specific nature of the allegedly libelous statement and the relief sought is unknown as the complaint is unavailable.

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[1] In 1933 Stanford Crosby was using the name S. Stewart Crosby.

We do know, however, that Standford Crosby was the sole plaintiff and Lloyd Crosby and others with whom the brothers were in business, were not parties to the action. On June 28, 1933 Stanford Crosby and Dun & Bradstreet entered into a stipulation wherein the action was settled. The defendant agreed to pay $300 and to "refrain from issuing or publishing any report, comment or statement either in writing or otherwise concerning [Stanford] * * * Crosby, the plaintiff herein, L. Lloyd Crosby [and others] * * * or concerning the business activities of any of the foregoing persons * * *; whether present, past or future." On July 8, 1933 the district court signed an order on that stipulation which was filed on July 10.

Since 1933 plaintiff and his brother have severed business relations and they are now in competing businesses in the Pittsburgh area. Stanford Crosby desires a termination of the 1933 order, under Rule 60(b)(5) and (6) of the Federal Rules of Civil Procedure,[2] claiming that the absence of a listing by the well-known Dun & Bradstreet credit information company makes it difficult for him to get credit. Lloyd Crosby, on the other hand, alleges that Stanford Crosby's purpose is to destroy his business. The defendant, Dun & Bradstreet, opposes termination of the order unless its right to make reference to Lloyd Crosby in its statement about Stanford Crosby is protected.

In memorandum orders dated April 10, 1962, the district court denied plaintiff's motion. On May 11, 1962, 31 days later, in an ex parte proceeding, plaintiff received permission in the district court to file a notice of appeal out of

---

[2] "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (5) * * * it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

time.[3] At the argument before this court, appellee Lloyd Crosby challenged our jurisdiction over the appeal. In an order filed November 14, 1962, we held that, under Rule 6 of the Federal Rules of Civil Procedure, it was "beyond the power of the district court to extend the time of the appellant to file its notice of appeal by ex parte order dated May 11, 1962, if the 30-day period had already expired." However, no file date was stamped on the order and we thought it quite possible that the orders had in fact not been entered by the clerk of the district court until April 11. Accordingly, under Rule 75(h), Federal Rules of Civil Procedure, we directed "that the district court determine the correct date of the entry of the orders dated April 10, and that a supplemental record including these findings be certified and transmitted to this court." The district court has certified that the orders were deposited for filing and entry on April 11, 1962, and accordingly it is clear that the notice of appeal was filed within thirty days. We proceed to the merits.

The 1933 order was extremely broad in its terms. It restrained the defendant from publishing any report, past, present or future, about certain named persons. It is true that the order arose out of a libel action. But even assuming, contrary to authority, *American Malting Co.* v. *Keitel*, 209 Fed. 331 (2 Cir. 1913), that it is proper for a federal court to enjoin a libel, the order here in question was not directed solely to defamatory reports, comments or statements, but to "any" statements. In fact, from all that appears, it would seem that whatever The Bradstreet Company published in 1932 was not libelous as to Lloyd Crosby.

Lloyd Crosby contends that the order was entered on consent and that Bradstreet is bound by contract to refrain from publishing matter about him. We disagree. We are concerned with the power of a court of the United States

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[3] See Rule 73(a), Federal Rules of Civil Procedure.

to enjoin publication of information about a person, without regard to truth, falsity, or defamatory character of that information. Such an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has a right to know and which Dun & Bradstreet had and has the right to publish. The court was without power to make such an order; that the parties may have agreed to it is immaterial. [The 1933 injunction is so offensive and so contrary to constitutional mandates that the district court was under a duty to nullify it whenever the order came to its attention.]*

The order dated July 8, 1933 was in violation of the First Amendment to the Constitution, see *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931). *Shelly* v. *Kraemer*, 334 U. S. 1 (1948) indicates that the First Amendment limits court action. The order was void, and under Rule 60(b)(4) of the Federal Rules of Civil Procedure, the parties must be granted relief therefrom.

In any event, there does not seem to be any equity in Lloyd Crosby's position since he requests the continuation of an injunction which should never have been entered in the first place.[4]

We reverse the order of April 10, 1962, with directions that the district court nullify the order of July 1933.

---

[4] Appellant contends that Lloyd Crosby, appellee, has no standing to oppose this motion because he was not party to the action in 1933. In view of our disposition of the case we do not reach this question.

* [Deleted, as shown in Exhibit 1 annexed to this appendix.]

Exhibit 1 to Appendix B

["Jurisdiction" Order Referred to in Court of Appeals' Opinion]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 60—October Term, 1962

Argued October 23, 1962 Decided November 13, 1962

Docket No. 27606

S. STEWART CROSBY,

Plaintiff-Appellant,

v.

THE BRADSTREET COMPANY,

Defendant-Appellee,

and

L. LLOYD CROSBY,

Appellee.

Before LUMBARD, Chief Judge, MOORE and HAYS, Circuit Judges.

Copal Mintz, New York, N. Y., for plaintiff-appellant.

Chester Bordeau, New York, N. Y. (White & Case, New York, N. Y., on the brief) for defendant-appellee.

Jay Leo Rothschild, New York, N. Y. for appellee.

The appellee, L. Lloyd Crosby, raises on appeal the question of whether the filing of the notice of the appeal

was out of time as not filed within "30 days from the entry of the judgment." Rule 73(a), Federal Rules of Civil Procedure. It appears to us that, under Rule 6 of the Federal Rules of Civil Procedure, it was beyond the power of the district court to extend the time of the appellant to file its notice of appeal by ex parte order dated May 11, 1962, if the 30-day period had already expired. The district court did not find when the order dated April 11 was entered and, because (1) there is no filed date on the orders, (2) the April 10 docket entries followed four April 11 entries, and (3) the New York Law Journal did not report the order until April 12, it seems quite possible that the orders, both dated April 10, 1962, were in fact not entered by the clerk of the district court until April 11. We do not consider the district court's order of May 11 to be a finding as to the date of entry as it appears to be based on an ex parte statement without an examination of the clerk or his records.

Accordingly, under Rule 75(h), Federal Rules of Civil Procedure, we direct that the district court determine the correct date of the entry of the orders dated April 10, and that a supplemental record including these findings be certified and transmitted to this court.

J. EDWARD LUMBARD

LEONARD P. MOORE

PAUL R. HAYS

U.S.C.J.J.

APPENDIX C

First Amendment to the Constitution of the United States

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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Respectfully submitted by
COPAL MINTZ

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 940

L. LLOYD CROSBY,
Petitioner,

v.

THE BRADSTREET COMPANY, and
S. STEWART CROSBY,
Respondents.

BRIEF IN BEHALF OF RESPONDENT S. STEWART CROSBY OPPOSING ISSUANCE OF WRIT OF CERTIORARI

COPAL MINTZ,
Counsel for Respondent Crosby,
150 Broadway,
New York 38, N. Y.

ACKERMAN PRESS, Phones BO 9-7107-8

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 940.

L. LLOYD CROSBY,

Petitioner,

v.

THE BRADSTREET COMPANY, and
S. STEWART CROSBY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent S. Stewart Crosby—*the plaintiff and moving party* in the courts below—respectfully submits that the petition for writ of certiorari should be denied because:

1. The case, stated correctly, does not present a question which merits the Court's consideration; and

2. Petitioner has no standing to complain of the vacatur of an injunction which had been granted (a) in respondent Crosby's individual—and *not class*—action, (b) to which Petitioner was not a party of record, (c) on a cause of action or grievance which Petitioner did not in any way share, and (d) which Petitioner could not allege as a ground for relief to him.

The Case and Questions Stated Accurately

Petitioner misconceives the questions presented by this case.

The moving party in the courts below was the person in whose favor, as plaintiff, a perpetual injunction had been granted on the defendant's, Bradstreet's, consent. He was not a restrained party seeking to be relieved of the restraint or to escape liability for violation thereof. The injunction did not in any way restrain him.

A party in whose favor an injunction is entered may waive his rights thereunder or discharge it precisely as one in whose favor a money judgment is entered (*Rehill* v. *Rehill*, 304 N. Y. 126 (1953); *Frederick* v. *Frederick*, 5 A D 2d 783 (N. Y. 1958)). So completely dependent upon the will of a plaintiff and his adherence thereto is the continuation of an injunction, that his consent to conduct, contrary to the injunction, not only immunizes the restrained party from judicial punishment; such consent may be "so inconsistent with the spirit of the decree as to call for its vacatur" notwithstanding reservations attached to the consent (*Dictograph Products Inc.* v. *Empire State Hearing Aid Bureau, Inc.*, 4 A D 2d 508, 511-12 (N. Y. 1957)).

In this case, on the written consent of the defendant and the record plaintiff and no one else, the defendant (The Bradstreet Company and its successor, Dun & Bradstreet, Inc.) was enjoined from

> "issuing or publishing *any* report, comment or statement either in writing or otherwise concerning S. Stewart Crosby, the plaintiff herein, L. Lloyd Crosby, Henry A. Grossberg, Bernard Crosby, DuPree Freres Inc. and the American Fur Breeders Cooperative Marketing Association Inc. or concerning the business activities of any of the foregoing persons or corpora-

tions, whether present, past *or future*." (Emphasis supplied.)

It will be noted that the injunction was not limited to untruthful or unfair publication. Nor was it limited to defamatory matter. Nor to past events. It included judicial proceedings, future as well as past. If any of the named persons committed and were convicted, before or after the date of the injunction, of bank robbery or multi-million dollar fraud or arson or murder or fraudulent bankruptcy, or even died, defendant was restrained from publicizing such fact, and the restraint was forever.

The Injunction Was a Judicial Monstrosity

Nowhere has there been found a parallel to such an injunction, to one so shocking in its substance and sweep or so malfeasant in purpose and effect. Its purpose and effect, the petition concedes (impliedly if not explicitly) were to mislead businessmen to extend credit which they would withhold and to engage in transactions from which they would abstain, if the suppressed facts were known to them. Thereby, the court was used as an instrumentality of—and in effect and result became a party to—fraudulent concealment. It is the vacatur of such an injunction that petitioner argues was inequitable and against good conscience.

The fact that parties consented to such a perversion of the judicial process does not make it proper or justify it. Completely fallacious is the concept that the consent of parties validates anything that a court does on such consent (see p. 6, *infra*). Suppose a defendant in a civil suit were to consent to imprisonment as if convicted of felony or to a decree of enslavement or peonage to the plaintiff or to perpetual restraint from engaging anywhere in the world in a common occupation or to be discrimi-

nated against because of his race or color or religion, would it be said, in any of those instances, that a court is required *or may* enter the requested decree?

It is inconceivable that the late Judge Bondy would have signed the order had he sensed the purpose and effect thereof. The stipulation did not contain a full or adequate disclosure. It did no more than indicate that the plaintiff had been unjustly libelled and defendant was agreeing to make amends by paying the paltry sum of $300 and agreeing to refrain from repetition. Superficially, the stipulation and proposed order appeared innocent and appropriate. To be sure, a careful reading would have raised questions; but consented to applications, especially where the parties or one of them are or is of recognized repute, normally—and occasionally, as in this case, unfortunately—are examined very cursorily.

Doubtless, if the true nature of the order ever had come to the attention of Judge Bondy, he would have felt outraged and would have peremptorily vacated it.

The Court of Appeals could not do otherwise, when the true nature of the order came to its attention. Naturally, it could perceive no "equity in [the present petitioner's] position since he requests the continuation of an injunction which should never have been entered in the first place."

That is what District Judge Sugarman overlooked when he refused to vacate the injunction on the ground that "the harm which will befall L. Lloyd Crosby [the present petitioner] if the relief sought is granted by far outweighs the benefits that may accrue therefrom to the plaintiff" (5a). He failed to recognize that "the harm" would be the publication of the truth, the concealment of which from the interested business community was a fraud upon them. Also he overlooked that L. Lloyd Crosby, the present petitioner, accomplished that fraud by utilizing the error in the defendant's report concerning the plaintiff, his brother,

as a vehicle to procure through a suit by the plaintiff an injunction to suppress the damaging truth concerning himself (Lloyd) for the purpose, by such suppression of the truth, of procuring or inducing credit and business which he feared would be withheld if the truth were published.

It seems to the undersigned that citation of authority is not necessary to demonstrate that such a scheme is not one which a court of the United States should have fructified by the exercise of its equity powers or should continue by refusing to exercise its control over its judgments.

The Vacatur of the Injunction Does Not Require the Invocation of the Constitution

The Court of Appeals did not rest its decision on the ground that the injunction violated either the plaintiff's or the defendant's constitutional right to free speech or free press. What the Court said was that the injunction was so repulsive to our basic notions of freedom of information, as exemplified and sanctified by the First Amendment, that no Court should enter or continue a decree such as Judge Bondy—unwittingly, it is fair to presume—signed on July 8, 1933. Can there be any reasonable disagreement with that? The consent of the parties, as already stated, is irrelevant to the consideration of whether the substance of the decree was at war with constitution and law; courts are not bound by the consent of litigants; a court does not have to enter whatever decree parties may consent to; it should enter only such decrees as it is satisfied are proper and would be, in the absence of the consent of the parties, within the court's proper exercise of power.

No Contract Stands in the Way of Vacatur

It is immaterial whether or not the stipulation was a contract, for surely the decree was not a contract in any sense of the term (*U. S.* v. *Swift & Co.*, 286 U. S. 106, 115-116 (1931); *System Federation, etc.* v. *Wright*, 364 U. S. 642 (1960)).

Moreover, contracts are not binding, if they are illegal or contrary to public policy. Furthermore, since there was no pact between the defendant and the petitioner, the latter's rights as a third-party beneficiary (if there were here a contract), would have been subordinate to the rights, will and conduct of the plaintiff as the promisee party, not the converse as asserted by petitioner (see *Alexander* v. *Equitable Life Assurance Society*, 233 N. Y. 300 (1922); *Gennett* v. *Smith*, 244 App. Div. (N. Y. 1935) 3).

It seems too plain to require argument that public policy is violated by a contract to suppress from businessmen record facts which the commercial world regards material to the extension of credit and by such suppression to mislead businessmen to extend credit which they would withhold if the suppressed facts were known to them. Even when (as not here) supported by a laudable motive, it may well be doubted that a contract unreasonably restraining the right freely to speak and publish the truth, would be enforcible; it is suggested that such contracts are in the same class as other unreasonable or unconscionable or restrictive or negative covenants and undertakings, such as not to engage in an occupation or to be another's slave or surrendering other basic and constitutionally protected human rights (e.g., *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Barrows* v. *Jackson*, 346 U. S. 249 (1953); *Murray* v. *Cooper*, 268 App. Div. 411, aff'd 294 N. Y. 658 (1945); *Clark Paper & Manufacturing Co.* v. *Stenacher*, 236 N. Y. 312 (1923).

Petitioner Had and Has No Standing to Object to the Vacatur

In addition, it is submitted that, as one who was not a party to the suit which resulted in the injunction and could not have been a party because he was not in any way actionably aggrieved and had no equities in his favor, petitioner L. Lloyd Crosby had and has no standing to interfere with the normal unilateral right of the plaintiff as the holder of a judgment to discharge it.

The question is not as in *Drummond* v. *U. S.*, 324 U. S. 316 (1945), and in *Minneapolis Honeywell Regulator Co.* v. *Thermoco, Inc.*, 116 F. 2d 845 (1941),* whether petitioner was "bound" by the order. The question is whether petitioner, not a party of record to the judgment, has standing to interfere with the normal rights of the holder of a judgment. The following observation of Judge Hand in the *Minneapolis-Honeywell Regulator Co.* case cited by petitioner is highly apposite: "If the [non-parties] had wished to enjoy the privileges of a party, they should have been parties if they could. If they could not, *a fortiori*, they should not have the privileges of a party" (at p. 848).

Petitioner is in the position of *one who could not have been a party*. If plaintiff was merely "fronting" for Lloyd, the fact is that it was only through plaintiff as one who personally was aggrieved by reason of the wrong to himself (since Lloyd had not been wronged) that Lloyd could achieve his purpose; never was Lloyd in a position to ask that he be substituted as the plaintiff or to be added as a plaintiff. Since Lloyd's interests not only were not, but could not have been, considered at the time of the in-

* Incidentally, in each of those cases the behind the scene party was held not bound.

junction, they are barred from being considered now. Having no rights of his own, Lloyd cannot help having to abide by whatever his "front" elects to do.

Furthermore, even if, because he caused to be included in the restraint the reporting on Lloyd and others, it reasonably could be held that the plaintiff lost the absolute control over the continuation of the injunction which as sole plaintiff he otherwise would have, it certainly does not follow that the court was bound to refuse the plaintiff's application simply because it would deprive Lloyd of a judicial shield from the truth which never should have been given to him and which no court of the United States ever should give to anyone.

No case has been cited in which termination or relaxation of an injunction was refused when sought by the party who procured the injunction.

The Decision of the Court of Appeals is Not in Conflict With Any Prior Decision Anywhere

In re George F. Nord Building Corp., 129 F. 2d 173 (7th Circ.), c. d. 317 U. S. 670 (1943), is not in point. There a restrained party who had consented to the injunction and then violated it, appealed from an adjudication of contempt of court. The restraint in that case was limited both in scope and time: during the pendency of reorganization proceedings, the court in charge thereof enjoined the sending of any general written communications to the creditors of the debtor or to the shareholders of the corporation formed to continue the debtor's business "without first having such communication approved by this court". A party so enjoined upon his consent, without moving to vacate it, and without submitting to the court for its approval the communication which he desired to make, circularized a communication in direct violation of the injunction. The Court of Appeals construed the pro-

hibition of "general written communications" as meaning "communications relating to the reorganization, not to irrelevant communications" because "Surely, the lower court did not intend to enter a ridiculous order, but rather an order designed to protect the plan of reorganization". The Court of Appeals noted further that it did not have before it "a cause of one not a party to the record". Nor did it have before it an application by the party who had procured the injunction.

Similarly, in *Halstead* v. *Securities & Exchange Commission*, 182 F. 2d 660, c. d. 340 U. S. 834 (1950), and in *National Labor Relations Board* v. *Federbush Co.*, 121 F. 2d 954 (2d Cir., 1941), the restraints were very temporary and for a special transitory purpose; the first of these did no more than restrain the solicitation of fees and had nothing to do with information, and the second was to prevent unlawful influencing of an election.

In *U. S.* v. *Lorain Journal Co.*, 342 U. S. 143 (1951) and *U. S.* v. *Associated Press*, 326 U. S. 1 (1945), the injunctions, respectively, restrained refusals to publish and to disseminate—the direct converse of prohibiting publication.

Without synposizing any of the other cases cited in the petitioner's brief, it suffices to say that not one of them presents a parallel to the injunction in this case and not one of them constitutes or presents an argument against the patently laudable decision which the Court of Appeals rendered in this case.

Petitioner's Impugning of the Plaintiff's Motives is Without Substance and is Irrelevant

The Court of Appeals vacated the injunction because its substance was offensive to the administration of justice and for that reason the injunction never should have been

entered. Consequently, plaintiff's motive in calling the improvident injunction to the court's attention and asking for its vacatur is immaterial.

Moreover, petitioner's charges were expressly denied by the plaintiff, who requested the District Judge to hold a hearing thereon if the charges were to affect his decision (25a, 28a, 34a). It is apparent from the District Court's decision (4a-5a) that it ignored the charges and determined the application *solely* on the balancing of "the harm which will befall L. Lloyd Crosby if the relief sought is granted" against "the benefits that may accrue therefrom to the plaintiff". The Court of Appeals also ignored the charges.

The charges were ignored because they were immaterial to the issue of the intrinsic propriety of the injunction as a judicial process. Moreover, those charges could not withstand the scrutiny of logic. Since the restraint was solely against Dun & Bradstreet and not the plaintiff or anybody else, if petitioner was motivated by "hatred" and desire to "wreck" his brother's business, he could have and would have published and circulated, in a variety of ways, the concealed true facts appearing in public records. The plaintiff could have procured publication in the reports of reporting and rating agencies other than Dun & Bradstreet; indeed, he could have caused petitioner harm by widespread publication of these vacatur proceedings. Obviously, he very effectively could have reeked hatreds and destruction through channels other than Dun & Bradstreet. The absence of a suggestion of any such conduct proves that the charges were the product of an imagination bent on creating an "atmosphere" hostile to the application and of sympathy for the opponent thereto.

Conclusion

Whether the District Court in 1933 acted in excess of or beyond its "jurisdiction" or "power" or only erroneously, is, for the purposes of this case, immaterial. The controlling fact is that the nature, substance and effect of the decree are such that its entry was an incredible perversion of the judicial function and, therefore, regardless of who moved or opposed its vacatur or when, the court's inherent power over its own processes was, in vindication thereof, most urgently called to action as soon as the Court became conscious of the scope and intent and effect of the order of July 8, 1933.

The petition, it is respectfully submitted, should be denied.

Respectfully submitted,

COPAL MINTZ,
Attorney for S. Stewart Crosby.

April 9, 1963.

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Supreme Court of the United States

OCTOBER TERM, 1962.

Docket No. 940

L. LLOYD CROSBY,

Petitioner,

v.

THE BRADSTREET COMPANY and S. STEWART CROSBY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF

FOR RESPONDENT DUN & BRADSTREET, INC. SUED HEREIN AS THE BRADSTREET COMPANY IN OPPOSITION.

CHESTER BORDEAU,
Counsel for Respondent,
DUN & BRADSTREET, INC.,
sued herein as The Bradstreet Company,
14 Wall Street,
New York 5, N. Y.

WHITE & CASE,
of Counsel.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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BRIEF

FOR RESPONDENT DUN & BRADSTREET, INC. SUED HEREIN AS THE BRADSTREET COMPANY IN OPPOSITION.

The Opinions Below.

The opinions below are printed in petitioner's appendices A and B. The opinion of the Court of Appeals appears in 312 F. 2d 483.

Question Presented.

Respondent, Dun & Bradstreet, Inc., sued herein as The Bradstreet Company, is unable to accept the questions formulated by petitioner as correctly representing the questions in this case.

Petitioner misconceives the controlling question involved in this litigation.

The controlling question is:

> Whether a United States District Court in a diversity case in which plaintiff sought damages for and an injunction against the publication of a libel, acted in excess of its power and jurisdiction in making an order enjoining respondent Dun & Bradstreet, Inc., a mercantile agency, from issuing *any* report with respect to plaintiff and others (*not* parties to the litigation), whether defamatory or not defamatory, to which Dun & Bradstreet, Inc. consented by stipulation of settlement.

Statement of the Case.

An order was made on July 8, 1933 by the Honorable William Bondy (pages 5a, 6a of appellant's appendix in Court of Appeals). The order was made in an action pending in the United States District Court for the Southern District of New York, commenced in the Supreme Court of the State of New York, New York County and transferred by defendant on diversity grounds alone to the District Court. Plaintiff was S. Stewart Crosby (respondent here) and defendant was The Bradstreet Company (now Dun & Bradstreet, Inc. and respondent here). The order provided that the action was settled and discontinued and

> "Ordered, that the defendant, The Bradstreet Company and its successors, Dun & Bradstreet, Inc. *refrain from issuing or publishing any report, comment or statement either in writing or otherwise* [emphasis added] concerning S. Stewart Crosby [a respondent here], the plaintiff herein, L. Lloyd Crosby [not a party to the action and petitioner here], Henry A. Grossberg, Bernard Crosby, DuPree Freres, Inc., and the American Fur Breeders Co-operative Marketing Association Inc. or concerning

> the business activities of any of the foregoing persons or corporations, whether present, past or future."

Petitioner was not a party to this litigation and the injunction insofar as it favored him may well have been for that reason[1] in excess of the power and the jurisdiction of the court. *California* v. *San Pablo &c. Railroad*, 149 U. S. 308, 314 (1893).

This order was made upon a stipulation signed by the attorneys for the parties to the action (respondents S. Stewart Crosby and Dun & Bradstreet, Inc., pages 6a and 7a of appellant's appendix in Court of Appeals). Their stipulation, in addition to providing for the making of the aforesaid order, provided for the payment by defendant (respondent here, Dun & Bradstreet, Inc.) to plaintiff (respondent here, S. Stewart Crosby) of $300 and the furnishing of releases by said plaintiff in favor of said defendant.

The *complaint*, which was probably before the court when making the aforesaid order, appears to be unavailable to any of the parties.

In an affidavit submitted by S. Stewart Crosby in support of the application for an order terminating or dissolving or annulling the order of the court dated July 8, 1933, it is stated (page 30a of appellant's appendix in the Court of Appeals):

> "'The libel complained of in 1932 was not a report that I had been indicted and acquitted but a report that I had been found guilty and sentenced. Had such a report been published regarding my brother, it would have been true. He was in no position to complain of libel against him. It was I who complained of the false report concerning me. In the circum-

[1] As well as for the reasons outlined hereinafter on pages 6, 7, and 8.

> stances set forth in my petition the suit for a judgment in my favor was utilized by my brother to procure, by a stipulated order, a shield for himself from the truth as it related to him. I verily believe that I am under neither moral nor legal obligation to continue that shield for my brother in perpetuity and that, in the circumstances in which now I find myself, my rights as the sole plaintiff herein should not be obstructed by heeding my brother's objections. I verily believe that he is not a party entitled to be heard and, moreover, his grounds of opposition are not such as to commend themselves to the favor of the court."

The other papers on file are the answer of defendant, a copy of which appears at pages 1a to 5a of appendix of respondent Dun & Bradstreet, Inc. in the Court of Appeals and the petition for removal of the case from the Supreme Court of the State of New York to the United States District Court for the Southern District of New York, indicating that the removal was made upon the ground of diversity of citizenship of the parties to the action and the order of July 8, 1933.

Defendant's *answer,* before the court when making the aforesaid order, in paragraph 6 thereof admits that on the request of *one* of its subscribers it delivered a copy of the report referred to in paragraph 5 of the complaint.

For a complete affirmative defense it is alleged that defendant is a mercantile agency employed by its subscribers to compile information with respect to the estimated financial worth of certain corporations, firms and individuals doing business in the United States and Canada and to furnish such information to its subscribers upon their inquiry therefor pursuant to its subscription agreement to be held by such subscribers in strict confidence and not to be revealed

to others and that, under these circumstances, it furnished to *one* of its subscribers, in good faith, in confidence, without malice and on a privileged occasion, the report referred to in paragraph of the complaint marked 5.

For a partial defense it is alleged that the report referred to in the complaint was in error in stating that:

> "The finding of the jury was to the effect that Stanley Grossberg [S. Stewart Crosby, respondent in this court] was guilty of fraud."

and that as soon as it learned that such statement was in error it voluntarily recalled the report and advised the subscriber in regard to the error contained therein.

In other words, the wrong complained of was eliminated immediately and without apprehension of repetition, before the making of the order of injunction.

Reasons for not Granting the Writ.

The petition for certiorari should be denied because under Rule 19 of the Rules of the Supreme Court relating to "Considerations Governing Review On Certiorari", the petition for certiorari is without merit. *Magnum Co.* v. *Coty*, 262 U. S. 159, 163 (1922).

The petition for certiorari is not "certworthy". (Mr. Justice Harlan, *Manning the Dikes*, 13 Record of the Association of the Bar of the City of New York, 541, 549, 553, 561 (1958).)

The questions sought to be reviewed by petitioner are not of general importance.

The fact that the appeal before the Court of Appeals is claimed to have been wrongly decided is no ground for the granting of certiorari.

There are no special and important reasons for review.

There is no conflict of decisions among the lower federal courts on a point of federal law.

Argument in Support of Reasons for Not Granting Writ.

Courts from early times generally and traditionally have taken the view that, at least in the absence of independent grounds of equitable jurisdiction, equity will not assume the power and the jurisdiction to issue an injunction restraining the publication of a statement defamatory of a plaintiff.

Honorable Reuben H. Walworth, Chancellor of the State of New York, in *Brandreth* v. *Lance*, 8 Paige Ch. (N. Y.) 24, 27 (1839), stated the rule with respect to the lack of power or jurisdiction of equity to issue any injunction restraining the publications of defamatory statements:

> "The utmost extent to which the court of chancery has ever gone in restraining any publication by injunction, has been upon the principle of protecting the rights of property."

And at page 28 the Chancellor stated:

> "As the publication of the work, therefore, which is sought to be restrained, cannot be considered as an invasion of the rights either of literary or medical property, although it is unquestionably intended as a gross libel upon the complainant personally, *this court has no jurisdiction or authority to interfere for his protection* [emphasis added]. And if the defendants persist in their intention of giving this libellous production to the public, he must seek his remedy by a civil suit in a court of law; or by instituting a criminal prosecution, to the end that the libellers, upon conviction, may receive their appropriate punishment, in the penitentiary or otherwise."

Courts have concluded that they are without the power or the jurisdiction to restrain the publication of defamatory statements (as here) even though the defamatory statement may affect a plaintiff in his business or his property *except* where the defamatory statement was merely an incident of a larger situation held to present a proper case for the intervention of equity. *Brandreth* v. *Lance*, 8 Paige Ch. (N. Y.) 24, 27 (1839); *Marlin Fire Arms Co.* v. *Shields*, 171 N. Y. 384 (1902); *Nann* v. *Raimist*, 255 N. Y. 307 (1931); *Wolf* v. *Gold*, 9 AD 2d (N. Y.) 257, 259 (1st Dept. 1959), rearg. and appeal den., 10 AD 2d (N. Y.) 561 (1st Dept. 1960); *American Malting Co.* v. *Keitel*, 209 F. 351 (CCA 2d 1913); 28 Am. Jur. *Injunctions*, §§133, 134 (1959); 36 Am. Jur. *Mercantile Agencies*, §12 (1941).

The principal grounds for equity's declination to assume the power and the jurisdiction to restrain the publication of defamatory statements are the traditional limitations of equitable power and jurisdiction to the protection against the invasion of property rights as distinguished from personal rights.

And courts of equity have declined to assume the power and the jurisdiction to enjoin defamatory statements on the grounds that actions for damages or criminal prosecution[2] are adequate remedies.

Apprehension that the potentiality that courts of equity assuming the power and jurisdiction to restrain the publication of a defamatory statement might assume to violate the constitutional rights of freedom of speech and press and the right of trial by jury, has contributed to the declination by courts of equity to assume the power and the jurisdiction to restrain the publication of defamatory statements.

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[2] Penal Law of the State of New York, Article 126, §§1340, 1341, 1342.

Here it is fundamentally significant that the injunctive order of July 8, 1933 provided for the restraint of the publication of any statements even those which were not defamatory, and even those statements made with good motives in good faith on justifiable occasions.

Certainly the court of equity should not assume the power and the jurisdiction to restrain publication of statements which are not defamatory in the absence of collateral and independent grounds for equitable jurisdiction.

Indeed, plaintiff could not properly have asked the district court to restrain the publication of statements which were not defamatory in the circumstances indicated by this record.

Chief Judge Lumbard, speaking for the Court of Appeals, stated (312 F. 2d 483, 485):

> "Lloyd Crosby [petitioner here] contends that the order was entered on consent and that Bradstreet is bound by contract to refrain from publishing matter about him. We disagree. We are concerned with the power of a court of the United States to enjoin publication of information about a person, without regard to truth, falsity, or defamatory character of that information."

Petitioner's argument that respondent, Dun & Bradstreet, Inc., by having consented to the entry of the order of injunction has waived any protection guaranteed by the First Amendment to the Constitution, misconceives the point. The point is that courts are without the power or the jurisdiction to make an order of injunction against the publication of a defamatory or true statement in the absence of special circumstances not present here. The fact that courts have refused to assume the power and the jurisdiction to make an order of injunction against such publication has

been occasioned, among other considerations noted hereinabove, by the apprehension that the assumption of such power and jurisdiction might be abused in restraining in advance the publication of communications, oral or written, true or untrue, thereby abridging the rights of freedom of speech and of the press. There are other reasons as indicated hereinabove why courts of equity have declined to assume the power and the jurisdiction to enjoin the publication of defamatory statements.

While a constitutional provision designed solely for the protection of the personal rights of a citizen may be waived, this does not mean that a court of equity has the power or jurisdiction to enjoin the publication of a defamatory or non-defamatory statement, in the absence of special circumstances warranting injunctive relief. See cases referred to on page 7 hereof.

The argument made by petitioner at pages 8 and 9 of his petition that the decision by the Court of Appeals is directly in conflict with *In Re George F. Nord Bldg. Corporation*, 129 F. 2d 173 (CA 7 1936); cert. den., 317 U. S. 670, and *United States* v. *Swift & Co.*, 286 U. S. 106 (1932), is without substance.

There is no conflict between *Nord* and this case. In *Nord* the injunction was not against the making of a defamatory statement. The order there was made by the court upon the confirmation of a plan of reorganization under the Bankruptcy Act, 11 USCA, to preclude any action which might in any way interfere with the carrying out of the plan so approved by the court. The provisions of the order with respect to the communications to creditors of the debtor were made "to protect the plan of reorganization" and to prevent interference with that plan. *Nord* is not in disagreement with this case nor with the cases referred to on page 7 hereof. In *Nord* there were collateral and

independent grounds warranting the issuance of an injunction, *i.e.*, the protection of the rights of creditors in having the plan of reorganization approved by the court executed without unapproved interference.

In *Swift* the decree enjoined the continuance of a combination in restraint of trade and commerce. "Monopolies and Combinations in Restraint of Trade, 15 USCA §1 *et seq.* It has no application here.

At page 9 of his petition, petitioner refers to anti-strike agreements and the enforcements thereof. Cases in the labor field are of no significance here, in view of the fact that injunctions against strikes or picketing are usually issued in connection with larger situations presenting facts held to warrant injunctive relief collaterally and independently, as in the federal cases referred to by petitioner.

Lack of Jurisdiction May not be Waived.

The question of lack of jurisdiction or the exercise of jurisdiction beyond the power of the court may be raised at any time. *McGrath* v. *Kristensen*, 340 U. S. 162, 167 (1950); *Manning* v. *Ketcham*, 58 F. 2d 948, 949 (CCA 6th Circuit, 1932).

The stipulation of the parties providing for the granting of the injunction did not confer the power or the jurisdiction on the court to grant the injunction. *Revona Realty Corp.* v. *Wasserman*, 4 AD 2d (N. Y.) 444, 447 (3d Dept. 1957); rearg. and appeal den., 8 AD 2d (N. Y.) 751 (3d Dept. 1959). The parties to the stipulation so providing are not estopped. *Cooper* v. *Davis*, 231 App. Div. (N. Y.) 527 (3d Dept. 1931); *Matter of Will of Walker*, 136 N. Y. 20, 29 (1892); *Matter of Dodge* v. *Supreme Court, State of N. Y.*, 249 App. Div. (N. Y.) 103, 110 (1st Dept. 1936), aff'd, 276 N. Y. 444 (1938).[3]

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[3] In a dissent not disapproved by the majority or by the Court of Appeals.

In 1 FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS, 734 [Fifth Edition 1925], it is stated:

> "Whether the court lacked power to act in the first instance by reason of its failure to acquire jurisdiction over the subject matter or the parties, or having been invested with such power, proceeded to make a determination outside or beyond the legitimate scope thereof, the result is the same. In either case the vitalizing element is lacking—the power to decide—without which no force or conclusiveness can be claimed for the judgment. Hence, though the court may have acquired the right to act in the cause and been put in possession of full jurisdiction to go ahead and dispose of the issues involved, its judgment in excess of the jurisdiction thus acquired or which transcends the judicial powers which it may rightly exercise under the law of its organization is subject to collateral attack for want or excess of jurisdiction, even though the parties may have acquiesced or consented to the exercise of the jurisdiction which the court assumed to exercise, for no act or volition of the litigants can confer a power upon the court which the law does not authorize it to exercise."

Conclusion.

The petition for a writ of certiorari should be denied.

Dated: New York, New York
April 8, 1963

Respectfully submitted,

CHESTER BORDEAU,
Counsel for Respondent,
DUN & BRADSTREET, INC.,
sued herein as The Bradstreet Company.

WHITE & CASE,
Of Counsel.

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THE BRADSTREET COMPANY, and
S. STEWART CROSBY,

Respondents.

PETITIONER'S REPLY ON PETITION FOR CERTIORARI

JAY LEO ROTHSCHILD,
Counsel for Petitioner,
10 East 40th Street,
New York, New York.

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Respondents.

PETITIONER'S REPLY

Respondents do not defend the Court of Appeals' reasons for reversal

Neither Bradstreet's nor S. Stewart Crosby's brief even attempts to support the reason given by the Court of Appeals for its decision, i.e., that the underlying decree was void because in violation of the First Amendment. It is plain, therefore, that both Respondents are satisfied that the Court of Appeals' opinion cannot be defended. Just as, in the District Court, neither Respondent asserted that the First Amendment required that the underlying decree be vacated, and, yet, in the Court of Appeals, for the first time, became opportunistic defenders of the Constitution, so, now, Respondents, having convinced the Court of Appeals that the First Amendment required a reversal, recognize that said contention is untenable, and, in this court, try a new tack. For, in this court, they assert that the decree made in the District Court was without "jurisdiction", and a "monstrosity".

Opportunism thus runs riot!

A Court of Appeals opinion which both Respondents shun, must be and is basically wrong. Its infirmity may

not be glossed over by semantics, i.e., in terms of "jurisdiction" rather than of constitutional invalidity. There was jurisdiction, and there was no constitutional invalidity.

The critical question

The result is, that notwithstanding this court's oft-repeated caveat that denial of certiorari does not necessarily indicate approval of the decision below—if certiorari be denied, and the Court of Appeals' determination be permitted to stand—its opinion will be deemed to promulgate the principle that litigants may not waive the First Amendment, but may opportunistically play fast and loose, as occasion may indicate to be expedient, even if the calculated effect be to work inequity and perpetrate fraud.

Whether such result should be tolerated, is the critical question, in an area in which only this Court may speak so that all may know.

Under such circumstances—though, as we have shown, there is indisputable conflict between the decision at bar, and others made in the Circuits and by this Court—the issue is more fundamental than whether a particular controversy merits review. It is as to whether a decision, unquestionably erroneous, and potentially capable of spawning untold litigations, predicated on its misapprehension of fundamental concepts of constitutional law—i.e., that the protections of the Constitution may be invoked, but may not be abused—should be permitted to stand and to mislead all those who will undoubtedly mistake it for a beacon to guide them.

The discretionary jurisdiction of this Court to correct error, is not arbitrarily compartmented or inflexibly contained within unyielding categories—as if the clock had been turned back, and a modern counterpart of rigid common-law forms of action had returned to plague us. Litigants should not be permitted to prevail on one ground, touching the Constitution and its application, and avoid review by this Court by disowning the very reason which they persuaded the Court of Appeals was applicable.

It is enough that, with respect to the Constitution, an erroneous decision has been made by a high court, which decision, if not corrected, will serve to confound and confuse.

Respondents' legalistic arguments are without merit

The legalistic arguments by which Respondents seek to evade acknowledgment of the real issue, are all anticipated in our Petition and shown to be without merit:

There was jurisdiction to make the underlying decree, *Chicot County Drainage District* v. *Baxter State Bank* (308 U. S. 371; our Petition, p. 10), permits of no doubt on that score.

There are circumstances, under New York Law, which is applicable in diversity cases, under which an injunction may issue to prevent a libel (*Wolf* v. *Gold*, 9 App. Div. 2nd 257*, and other cases cited at pp. 9-10 of our Petition).

Nor will equity tolerate "the doing of harm malevolently" (our Petition, p. 13, and cases there cited), *a fortiori*, where the objective, as here, was and is to perpetrate equitable fraud!

Petitioner has status

Nor is there any substance to Respondent S. Stewart Crosby's attempt to show that Petitioner, L. Lloyd Crosby is without standing to protect the decree which he procured and by which he is bound (our Petition, pp. 13-14). The distinctions attempted of our authorities are without substance (Respondent S. Stewart Crosby's brief, pp. 7-8). No issue is here presented, as there was in said cases, as to *whether* L. Lloyd Crosby was in control of the litigation (his brief, p. 7). He undoubtedly was. In his petition in the District Court, Respondent *S. Stewart Crosby so admits*:

> "4. According to petitioner's [S. Stewart Crosby's] present recollection, the action was brought at the instance of petitioner's brother L. Lloyd Crosby and the above disposition thereof was arranged by Mr. Davis

* The same principle was sustained after trial (*Wolf* v. *Gold*, 238 N.Y.S. 2nd 473—not yet officially reported).

also at the instance of petitioner's said brother." (Par. 4 of S. Stewart Crosby's petition in District Court, Appdx. 10a)

L. Lloyd Crosby's sponsorship of and participation in the litigation was open and manifest. As put by this court, his was, indeed, "the laboring oar". So much so that he was explicitly included within the ambit of the underlying decree.

It is, therefore, submitted that the Court of Appeals' decision, which Respondents are unable to defend, and which, after thirty years, actually reverses the underlying decree—not for lack of jurisdiction, but by reason of a different evaluation of what relief should have been granted—and does so with inequitable consequences—should not be permitted to stand.

Opportunistic and shifting arguments, made by Respondents as they move from court to court, should not prevail.

It is respectfully prayed that certiorari be granted.

Dated, April 12, 1963.

Respectfully submitted.

JAY LEO ROTHSCHILD,
Counsel for Petitioner.